No. 21307, No. 21307A, No. 21307B, No. 21307C

# United States Court of Appeals

FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., *et al.*,
UNION TANK CAR COMPANY,
WARD INDUSTRIES CORPORATION,

*Appellants,*
*Cross-Appellees,*

—v.—

U. S. A., EX REL MOSHER STEEL COMPANY,

*Appellee,*
*Cross-Appellants.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

## REPLY BRIEF OF APPELLANT, WARD INDUSTRIES CORPORATION


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## REPLY BRIEF OF APPELLANT, WARD INDUSTRIES CORPORATION

The purpose of this reply brief[1] is twofold: To respond to Mosher's attempt to sustain the palpable invalidity of the judgment rendered in its favor against Ward by the District Court; and to refute Union's frenetic effort to avoid its express promise to pay for Mosher's fabrication and delivery of Union's steel to Union by foisting that obli-

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[1] As appellee, Mosher has filed two briefs, one responding to Ward and other responding to Union. Since Mosher's version of the facts is set forth in both of its briefs, references to each will become necessary. Page references to Mosher's brief in response to Ward will be identified as "M-Ward" and page references to Mosher's brief in response to Union will be identified as "M-Union".

gation upon Ward. Each of these positions will be considered in turn:

## Ward's Reply to Mosher

Mosher's appellate approach vis-a-vis Ward is thoroughly uninhibited. It ignores the limitations imposed upon a litigant by the contents of the trial record which it characterizes somewhat disdainfully as a "dead record" (M-Ward 2). Its creed is simple: If a legal theory advanced below becomes untenable, discard it. If the evidence contained in the trial record becomes inconvenient, ignore it. If a new theory is needed, invent it. If a new fact is required, create it. What emerges upon this appeal from Mosher's application of its imaginative technique is a brand new posture which not only contradicts Mosher's position against Ward in the court below, but varies from paragraph to paragraph and page to page in its brief upon this appeal. Ward is now presented as a "coincidental" obligor (M-Ward 26), rather than as the "additional" obligor portrayed in the court below (R 1406).

The purpose of Mosher's newly conceived hypothesis is apparent. It is designed to avoid the irrefutable applicability to the "additional" obligor theory of the rule of law that Mosher's alleged promise to perform for IMI-Ward what it had already been bound to perform for Union cannot serve as a legally supportable consideration for the alleged promise of Ward to pay (Ward Opening Br., Point II, 66 et seq.) To sustain its judgment against Ward, premised by the District Court upon its alleged "agreement with IMI-Ward" (CL 4, R 1238), Mosher must establish a bargain which was duly consummated between itself and IMI-Ward; a bargain created by IMI-Ward's offer to Mosher and Mosher's acceptance of that offer, communi-

cated to IMI-Ward, upon all of the terms thereof (Williston on Contracts, 3rd Ed., vol. 1, pp. 211, 230, 235-238).

Try as it will, Mosher has been utterly unable to obscure the juridically dispositive fact which emerges with incandescent clarity from the trial record, the undisputed facts, the incontrovertible evidence and the findings of the District Court itself that *Mosher never accepted the only offer IMI-Ward ever made to Mosher, to wit, that Mosher release Union and substitute the credit of IMI-Ward for the credit of Union.* From Mosher's own version of the facts,[2] it can be demonstrated with conclusive finality that the parties never agreed upon the same thing at the same time and that no contract of any kind was ever formed between Mosher and IMI-Ward. In the language of this Court's decision in *Merritt-Chapman & Scott* v. *Gunderson Bros. Engineering Corp.,* 305 F. 2d 659 (1962), at p. 662:

> "Offer and acceptance are the tools by which courts and contract negotiators arrive at the illusive contractual concept of 'a meeting of the minds.' *The query is uniformly: Did the parties agree upon the same thing at the same time?* It is our opinion that *in this case they did not.*" (Italics ours)

**1. No contract of any kind was ever formed between Mosher and IMI-Ward.**

Mosher concedes that the "first appearance at Mosher" of anyone connected with IMI-Ward was the visit of Messrs. Holmes and Orr to the Mosher offices on October 31, 1961

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[2] In the ensuing discussion, we propose to adopt, solely for the purpose of argument, the factually insupportable claim of Mosher that Jt. Exs. 9 and 10 are not purchase orders offered by IMI alone, as we established at pp. 47 *et seq.* of our opening brief, but by IMI-Ward. Even upon that assumption, Mosher's own version of the facts conclusively establishes its continuous refusal to accept the only terms upon which Jt. Exs. 9 and 10 were ever offered to Mosher, i.e., "strictly on the credit of IMI-Ward Industries . . ." (RT 358-359).

(M-Union p. 16). It contends, and the District Court has found, that several weeks prior thereto, Mosher had concluded a valid, binding and subsisting oral contract with Union on October 13, 1961; that the oral contract of October 13, 1961 was embodied in a written letter agreement of October 16, 1961; that both Mosher and Union were unconditionally bound thereby and proceeded at once with their respective performances thereunder; that Mosher relied solely and exclusively upon the credit of Union in the consummation of that contract; and that neither IMI, Ward or IMI-Ward were involved therein in any manner whatsoever. (FF 21-28, R 1227-1228).

During that "first appearance" on October 31, 1961, according to Mosher, Holmes and Orr requested Mosher to "release" Union from its obligations to Mosher (Mitchell, R 50) and accept the credit of IMI-Ward in lieu of and as a substitute for the credit of Graver "due to bookkeeping and other problems" with which Mosher was not concerned (Moore R 43; Dep. vol. 1, 16-17). *That offer was summarily rejected on the spot.* Although Moore had no objection to accommodating the bookkeeping needs of IMI or Union, a matter to which he was completely indifferent (Moore, R 43), *he unconditionally refused to release Union and accept the credit of IMI-Ward as a substitute for the credit of Union,* and refused to permit a change in the name of the customer upon Mosher's books unless Union reaffirmed its obligation to pay Mosher direct.

Prior to October 31, 1961, Moore had concluded that the credit of IMI, Ward and IMI-Ward collectively was totally unacceptable (Moore RT 437-439). After his conversation with Holmes and Orr on October 31, 1961, he checked again to determine whether the credit of IMI-Ward "was really as bad as the people had stated it was" (Moore RT 437-439). His investigation confirmed anew the fact that

the credit of IMI-Ward "was as bad as they said it was" (Moore RT 466-467; Dep., vol. 1, pp. 12-16; 16-18).

Moore was obviously perturbed by Holmes and Orr's unexpected attempt to substitute a bad and thoroughly unsatisfactory credit for the credit of Union. As Mosher itself concedes, it realized at once that the request "would constitute a change in the agreement which it had theretofore had with Graver" (R 1470). As a result of the Holmes and Orr attempt, Moore no longer deemed it safe to rely solely upon the oral agreement of October 13 and the written agreement of October 16. He now resolved to demand directly from Union an explicit reaffirmation of its liability to Mosher. He was equally resolved that he would not release any of the materials then being fabricated by Mosher until he had received that reaffirmation from the lips of Union itself. He thereupon placed a stop order upon the very first shipment which was at that time virtually ready for delivery (Burton, RT 342-344).

On November 7, 1961, Harle, Graver's Director of Purchases, came to see Burton and Moore in Houston to ascertain why no shipment had been made as yet by Mosher. Harle was then informed that "a stop order" has been placed upon the very first shipment because "the credit matter" had not been straightened out. Burton told Harle "if we didn't get the credit matter straightened out, it would not be forthcoming . . ." (Burton, RT 342-344). Alarmed, Harle telephoned Page, Graver's Comptroller, and told him that the "shipments would be held up" by Mosher unless it received a positive reaffirmation from Union of Union's unconditional promise to pay (RT 355). Moore was equally explicit and uncompromising in talking to Page when Harle had finished (RT 355). Page told Moore that he would talk to Morton of IMI (RT 356).

On November 10, 1961, three days later, Jt. Exs. 9 and 10 were received at Mosher's Dallas office (Moore, RT 439-440), completely unsolicited and unanticipated (Moore, Dep. vol. II, pp. 47-48). Mitchell called Moore to inform him of their arrival. He was instructed by Moore to keep them on his desk "with no action on them" (Mitchell RT 169). The purpose of Jt. Exs. 9 and 10 soon became apparent.

On November 13, three days later, Orr called Moore and asked him to accept Jt. Exs. 9 and 10 "*strictly on the credit of IMI-Ward Industries* for shipment of the material" (Moore RT 358). Moore adamantly refused. Morton, IMI's President, then came on the phone and repeated the request. Again, Moore refused. "I told him", testified Moore, "we would not accept it on that basis" (Moore RT 359). Moore told Morton that he would not release any of the shipments unless Union agreed to pay Mosher directly for Mosher's work (Moore RT 360).

*The telephone talk between Moore of Mosher and Morton of IMI on November 13, 1961 constituted the very last discussion between Mosher and IMI or IMI-Ward upon the subject of credit* (Moore RT 360). In Moore's words, "there wasn't much else to say after that" (Moore RT 360). It is thus apparent that Mosher itself, both in the District Court and upon this appeal, has established beyond the possibility of controversy or dispute that Jt. Exs. 9 and 10 constituted no more than a written offer to Mosher, reiterating the oral offer by Holmes and Orr of October 31, to furnish Mosher with the credit of IMI-Ward *if and only if the credit of IMI-Ward was accepted as a substitute for Union's credit and Union were released of any obligation to Mosher.* That offer to substitute the credit of IMI-Ward for the credit of Union if Mosher's contract with Union were cancelled and Union released was the only offer that the Joint

Venture ever made to Mosher, be it October 31, November 10 or November 13, be it orally or by way of Jt. Exs. 9 and 10. And that offer, as the record conclusively shows, was unconditionally and unqualifiedly *rejected by Mosher* on each and every occasion when it was made (Moore RT 446-447). "To constitute acceptance, an offeree's manifestations of assent must be strictly within the terms of the offer." (*Merritt, Chapman & Scott Corp.* v. *Gunderson Bros. Engineering Corp.*, 305 F. 2d 659, 662).

It is apparent, therefore, from Mosher's own version of each and every communication between Mosher and IMI-Ward that IMI-Ward's offer of its own credit as a substitute for the credit of Union terminated with its rejection by Mosher on November 13.[3] That offer was never renewed by any representative of IMI-Ward to anyone connected with Mosher. It could not very well have been. On November 13, when Orr and Morton again offered to Mosher the credit of IMI-Ward as a substitute for Union's credit, the Joint Venture still possessed a right to the contract monies with which it might hope to discharge any

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[3] Mosher claims that it *accepted* Jt. Exs. 9 and 10 "after the Page conversation on November 15", although, concededly, there was absolutely no communication of any kind between Mosher and IMI-Ward after November 13, and the sole basis upon which Jt. Exs. 9 and 10 had been tendered by IMI-Ward to Mosher had never changed. Thus, Mosher states (R 1440):

> "It must always be remembered not only that the testimony of all the Mosher witnesses was to the effect that the Joint Venture Purchase Orders *were never accepted by Mosher until after the Page conversation on November 15,* but also that the *Mosher Shop Orders* and *other documents* in the record *show conclusively that Mosher undertook no obligation or benefit under the Joint Venture Purchase Orders until November 16,* and that the Joint Venture Purchase Orders were not even sent to the Home Office in Houston by Mr. Mitchell until that date, because he had held them on his desk from November 10 until November 16, *pending* confirmation of the Graver responsibility."

obligation to Mosher. After its rebuff by Mosher on that day, after the Joint Venture had authorized Union to deduct its payments to Mosher from the Joint Venture contract, it would have been sheer lunacy for the Joint Venture to pledge its credit *when it no longer possessed any right to the monies which would enable it to discharge that obligation;* when those funds would be deducted by Union from its contract; when Union had unconditionally promised to pay Mosher direct; and the possibility of substituting IMI-Ward's credit for Union's credit had finally terminated on November 15 with Page's reaffirmation of Union's liability to Moore.

Mosher knew, on November 13, when it refused to accept Jt. Exs. 9 and 10 "strictly on the credit of IMI-Ward Industries" that the offer represented by those exhibits was at an end. That is why the acknowledgment copies of Jt. Exs. 9 and 10 were never signed and returned by Mosher (Moore RT 441-442). That is why Jt. Exs. 9 and 10 were simply filed and no attention was ever paid to them (Moore, Dep. vol. II, 47-48). That is why Mosher testified again and again *that it never relied upon or looked to IMI, Ward or IMI-Ward for payment, from the commencement of its work until its completion,* even though it was sending invoices to IMI for the purpose of accommodating its clerical and bookkeeping requirements (Moore, RT 446-447, 453, 468-469, 471).

**2. IMI-Ward never promised to pay Mosher for its fabrication of Union's steel.**

Viewed from yet another vantage point, the record conclusively establishes the fact that no promise to pay Mosher for its fabrication of Union's steel was ever made at any time by IMI-Ward. On November 13, after Moore had rejected Morton's renewed request that Jt. Exs. 9 and 10

be accepted "strictly on the credit of IMI-Ward Industries", Moore himself testified that he asked Morton "to get in touch with Mr. Page and give his approval of having them (Union) pay for this work" (Moore RT 359; M-Union 21). According to Moore, Morton stated that, if that was the only way, "he (Morton) would have to give his approval" to Union (Moore RT 360; M-Union 21).

On November 15, during his telephone conversation with Page, Moore asked Page "if he had gotten clearance from Mr. Morton on the responsibility of *Graver making payment* for the material that we were fabricating *for them*" (Moore RT 361; M-Union 22). Moore asked Page if he had obtained Morton's approval "for them (Union) to pay us direct and deduct it from the contract" (RT 362; M-Union 22-23). Page told Moore (RT 362; M-Union 23):

> "He said that he had talked to Mr. Morton and Mr. Morton had given him approval."

Thus, Mosher itself irrefutably confirms the fact that Morton of IMI never promised Mosher that IMI or IMI-Ward would pay Mosher for its fabrication of Union's steel. What Morton indicated on November 13 that he might be compelled to do—approve the modification of the Joint Venture contract with Union which would provide for Union's deduction of monies payable to Mosher by Union—is precisely what he did do (Jt. Ex. 26). Consequently, by Mosher's own admissions, it was not IMI-Ward which committed a breach of any obligation which was even remotely due and owing to Mosher; it was Union, and only Union, which violated its clear, explicit and unconditional promise to pay Mosher directly for Mosher's fabrication of Union's steel.

Mosher's attempt to sustain its judgment against Ward upon the theory that, in some unfathomable manner, a con-

tract for its benefit was consummated between IMI-Ward and Union on November 13 is hopelessly untenable. A contract for the benefit of a third party is "a contract in which the promisor engages to the promisee to render some performance to a third person . . ." (Williston on Contracts, 3rd Ed., Vol. 2, §347, 792; §§402-403, 1089-1095). Although the promise is made to the promisee, the promised *performance is to be rendered directly to the third person.* Thus, in *Tomaso, Feitner & Lane* v. *Brown,* 4 N. Y. 2d 391, a corporation which planned an advertising campaign had received the promise of a major stockholder to furnish it with the funds to pay for such advertising services. Thereafter, he defaulted in his promise to the company to furnish it with funds. The advertising agency thereupon brought an action against the stockholder allegedly as a third-party beneficiary of the agreement between the stockholder and the company. The action was dismissed because the requisite monies were to be made available to the corporation and not to the advertising agency. (See also: *Warsawer* v. *Burghard,* 234 App. Div. 346)

**3. The judgment against Ward is insupportable in fact and law.**

The balance of Mosher's attempt to find a factual or legal rationale for its judgment against Ward consists of a tangled web of contradictions, misstatements and improvisations. Some of the choicer examples follow:

1. On page 26 (M-Ward), it is stated that "Mosher did not extend credit or deliver goods to IMI, but *to a Joint Venture* composed of IMI and Ward." Nine pages earlier, however, in the very same brief, Mosher admits (M-Ward, p. 17) that: "Ward's final contention that Mosher refused

to, and *did not, rely on the credit of the Joint Venture* or expect to be paid by it, *is absolutely true from the record . . .*"

2. At pp. 25 et seq. (M-Ward), Mosher formulates a brand new theory of its claim against Ward in the following language:

> "Mosher did not sue on, or obtain a judgment against Union in this proceeding on the basis of the oral contract made on October 13, 1961 or the letter agreement dated October 16, 1961 which constituted an interim purchase order for the Tucson work between Mosher and Union. . .
>
> Thus, at the Joint Venture's own solicitation, a new contractual relationship was created with Union's consent, so that Mosher was necessarily relieved of its duties under the October 16 interim purchase order and became obligated under the Joint Venture purchase orders and the agreement with Page that if Mosher would so perform, Union would pay Mosher."

Although newly improvised by Mosher, an identical thesis characterized as "metaphysical reasoning" was rejected by this Court as long ago as 1902 in the case of *Alaska Packers Ass'n* v. *Domenico,* 117 Fed. 99, 103, the principles of which were reaffirmed by this Court in *Power Service Corporation* v. *Joslyn,* 175 F. 2d 698, 701.

If Mosher was "necessarily relieved of its duties under the October 16 interim purchase order . . .", Union, obviously, was equally relieved therefrom. The precise contrary of that assertion was established by Mosher in the court below. Thus, Moore swore under oath as follows (Moore, Dep. vol. 1, 58):

"Q. *Did anybody at Mosher to your knowledge ever release Graver from its responsibility under the October 16 letter?*

A. *No.*" (Italics ours)

Again, Mosher stated (R 1431):

"At the time when this new arrangement was made, Union was bound to Mosher under the October 13 agreement, as embodied in the October 16 letter. As the result of the new agreements, which resulted from the request of Union and the Joint Venture (see Lancaster's memo to Branting dated November 7, 1961-Union L), the Joint Venture Purchase Orders were accepted, but Union *remained bound to pay. There is absolutely nothing in the record to indicate that Mosher ever released or intended to release Union from its obligation insofar as payment was concerned.*" (Italics ours)

Finally (R 1406):

"Union's liability under the interim purchase order (Pl. 1) *was not cancelled or relieved* by virtue of the two purchase orders (Jt. 9 and 10), received from the IMI-Ward Joint Venture, but said purchase orders created an additional obligor to the Plaintiff, *who did not release Union from its liability,* but, prior to, and as a condition of, the acceptance by it of such purchase orders, substituted for the formal purchase order it was to have received from the Defendant Union on the Davis-Monthan job, Union's oral agreement to pay the amount to become due for the work, materials and freight charges for the Tucson missile site and the Vandenberg missile site." (Italics ours)

3. Mosher insists that the addition by its witnesses of the words "Ward Industries Corporation" or "Ward" to the word "IMI" in their description of what transpired herein was not an "afterthought" (M-Ward 15) and refers, by way of proof, to its Miller Act letter to Fluor dated March 19, 1966 "long before any depositions were taken . . . " (M-Ward 15). The Miller Act letter to which Mosher refers was concededly the language and product of Mosher's counsel (Moore, Dep. vol. II, p. 36; RT 402). The letter immediately preceding that handiwork, to wit, Moore's letter of February 20, 1962, after IMI's bankruptcy, was the language of Moore in which he advised Fluor, without the ministrations of its counsel, that it furnished *"Idaho-Maryland Industries, Inc.", not IMI-Ward,* "with approximately $296,000.00 of fabricated steel and for fabricating steel furnished by Graver Tank" (Jt. Ex. 81; RT 402; Moore Dep., vol. II, pp. 32-35).

Mosher complains that the quotations from the record set forth in Ward's Opening Brief (pp. 20 et seq.) were unfair since, if "the witness could fairly understand that the question was whether it was the Joint Venture or IMI alone which was involved, the witness on deposition answered very clearly . . . " (M-Ward 16). The example cited by Mosher at page 16 is a classic example of a leading question in which the question itself supplies the answer desired by counsel to the alerted witness.

Without the guidance of counsel, Moore swore under oath (Moore R 43):

> "I was informed that *Idaho-Maryland Industries, Inc.* desired that *it* be substituted as the contracting party in lieu of Graver Tank and Mfg. Company due to bookkeeping and other problems with which Affiant was not concerned."

Moore (RT 437):

"Q. Well, now, to whom did they (Holmes and Orr) want the customer changed? What name did they want to substitute?

A. They wanted the name changed to *Idaho-Maryland* for convenience." (Italics ours)

Burton swore under oath (Burton RT 339):

"On October 31 I recall Mr. Holmes and Mr. Orr *of IMI* came into my office and asked me if I was getting along with the Tucson job." (Italics ours)

Again (Burton RT 339-340):

"And then I went with them to Dallas and sat down with Mr. Mitchell and worked out things with the sales department, what they were concerned with. And during the course of events they raised the question about transferring the contract *from Graver to IMI.*" (Italics ours)

Again (Burton RT 341):

"Well, they said on account of bookkeeping or processing of invoices etc. for payment that it would be better if the order or the invoices would be handled *through IMI.*" (Italics ours)

Burton (RT 343-344):

"Question. Can you tell me what you heard Mr. Harle say to Mr. Page when he got him on the telephone?

Answer. He told Mr. Page that . . . the *IMI* people had requested a transfer of the order to that name for accounting purposes, but that Mosher would not transfer the order until Graver would stand good for payment, . . . ." (Italics ours)

Burton (RT 346):

"Question. Tell us what Mr. Moore had to say in substance.

Answer. Mr. Moore said that *IMI* had requested a transfer of the order on the contract from Graver, but that we wouldn't accept it without Graver being responsible for the payment of the material, . . . " (Italics ours)

Mitchell (RT 161-162; Ward's Ex. F, RT 163):

"A few days thereafter representatives of *Idaho-Maryland Industries, IMI,* appeared in affiant's office . . . and asked affiant and Mr. Ralph Burton, vice president of the Mosher Steel Company, whether Mosher Steel Company would deal in the matter with *Idaho-Maryland Industries* rather than with Graver Tank and Manufacturing Company. Such representatives were informed . . . that Mosher Steel Company would not deal with *Idaho-Maryland Industries, IMI,* unless Graver Tank and Manufacturing Company remained liable under the agreement." (Italics ours)

The most superbly coached witnesses, under testimonial stress, often forget their script and recall only the facts. That is precisely what happened to Mosher's witnesses in

this case.[4] Even counsel are not immune to so human a frailty. For example, Union's attorneys, dedicated to the proposition that Jt. Exs. 9 and 10 are "IMI-Ward purchase orders", forgot themselves long enough to record at page 45 of its opening brief that:

> "In the present case, following receipt of *IMI's* purchase order, *IMI* was described on Mosher's shop records and ledger as its customer for whom the work was being performed and all invoices covering that work were sent to *IMI*, rather than Graver (Jt. Ex. 13 and 14), (M. Ex. 22-A)."

4. Mosher's treatment of the testimony of its own witnesses that, from start to finish, Mosher *never* relied upon or looked to IMI, Ward or IMI-Ward for payment, is an extraordinary feat of verbal legerdemain (M-Ward 17). We are told that, although Ward's "contention . . . *is absolutely true from the record*" (M-Ward 17), that did not mean "that Mosher relied only on the credit of Union" (p. 17). ". . . we have", says Mosher, "no Mosher agreement to look solely to Union for payment" (M-Ward 18).

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[4] In this area, Mosher was reduced to the necessity of quoting Orr. Thus, Mosher states (M-Ward 17):

> "Mr. Orr testified that the IMI printed forms were used because no Joint Venture printed forms were available. This is doubtless true."

Had Mosher examined the exhibits before making such a statement, the enormity of Orr's falsification would have been apparent. Orr testified that "later"—after November 3, 1961, the date of Jt. Exs. 9 and 10—"we got a stamp which said Joint Venture" (RT 856). As we pointed out in our opening brief (49, ft. 10), a stamp with the inscription "and Ward Industries Corporation, a joint venture", had been added to the printed inscription "Idaho-Maryland Industries", wherever requisite, continuously from September 18 to November 3. In fact, a second stamp was also used during this very same period which bore the inscription "IMI-Ward—Joint Venture". (See invoices #05522, 05521, 05293, 05294, 05299, 05504, 05296 and 05502 contained in Union Ex. UU).

Consequently, concludes Mosher, the fact that Mosher demanded and received the credit of Union does not effect "a release of the Joint Venture's obligation . . ." (M-Ward 21).

"Unless we are prepared to adopt the theory of the cynic that language was invented for the purpose of concealing thought" (*Johnson* v. *Travelers Insurance Co.*, 269 N. Y. 401, 407), Mosher cannot evade, avoid or torture the unconditional and unqualified phraseology of the testimony of its own witnesses that "from start to finish, from the beginning of the work of your company (Mosher) until its completion", Mosher had "*never* looked to IMI . . . or to Ward for payment" (Moore RT 446-447; 454; 468-469; 471). The sworn testimony of Mosher's witnesses has irretrievably destroyed Mosher's claims against Ward in this case beyond any possibility of repair by its counsel upon this appeal through the medium of semantic gymnastics.

5. Throughout the course of its brief, Mosher repeatedly asserts, as did the District Court, that its fabrication of Union's steel was performed "pursuant to" Jt. Exs. 9 and 10. In FF 39, the Court below had referred to Page's promise on November 15, 1961 to "pay Mosher directly for all the work *described* in Jt. Exs. 9 and 10" which concededly repeated in haec verba the precise terms and conditions set forth in the letter agreement of October 16, and confirmed the oral agreement of October 13. A due regard for accuracy would have required the Court to refer to the work of fabrication *as being described in the letter agreement of October 16* since it could hardly be stated that the work continuously performed by Mosher from October 16, 1961 could have been described in a document which was not even born until several weeks later. In FF 39, the District Court proceeded from its reference to "the work *described* in Jt. Exs. 9 and 10 in evidence" (R 1232)

to the statement, in the very next sentence of the same finding (R 1233), that, upon the receipt of Page's promise, Moore "permitted the release and shipment of the steel fabricated by Mosher *pursuant* to Jt. Exs. 9 and 10 . . ." The chasm between the work "described" in those exhibits and the work performed "pursuant to" the same exhibits was bridged by the District Court without a pause.

It would undoubtedly be equally accurate to say that Mosher performed the work of fabrication *described* in the several briefs herein. It is quite a different matter to say that Mosher performed the work of fabrication *pursuant* to the various briefs herein. Not even Mosher, facile as it is, has been able to explain how the more than $40,000.00 of work which it performed prior to November 16, 1961 (FF 24, R 1227) could have been performed "pursuant to" documents which, concededly, did not then exist.

6. Mosher has literally dumped into its brief against Ward five Illinois citations which it indiscriminately gathered from its brief against Union, all of which deal only with the applicability of the Illinois Statute of Frauds to Page's oral promise to Mosher of November 15. Limited to the Illinois statute, they are unintelligible against Ward. None of them deal with the question of whether a promise to perform what one is already legally bound to perform can constitute a valid or sufficient consideration for the subsequent promise of another to pay. None of them are pertinent upon any other issue relevant to this appeal.

In our Opening Brief, pp. 66 et seq., we emphasized the fact that, under New York law, a third party was bound by an agreement between two joint venturers restricting their authority, and that "Because there is a joint venture, it does not necessarily follow that there is a mutual agency

even as to third parties", citing *American Mut. L. Ins. Co.* v. *Hanna, Zabriskie and Dacron*, 1941, 297 Mich. 599, 298 N.W. 296.

The rules of law set forth in *Hanna, Zabriskie and Dacron, supra*, were approved and applied by this Court in *Matanuska Valley Bank* v. *Arnold et al*, 223 F. 2d 778 (1955), wherein this Court ruled at 780:

> "A joint venture is distinguished from a partnership in that one member cannot bind another unless he has either express authority or authority implied from the necessities of the particular transaction with which the joint venture is concerned. See American Mut. Liability Ins. Co. v. Hanna, Zabriskie and Dacron, 1941, 297 Mich. 599, 298 N. W. 296, 299. *Davis, as a joint adventurer, did not have the general implied authority of a partner in an ordinary trading or commercial partnership.* * * *" (Italics ours)

## Ward's Reply to Union

Union's primary objective upon this appeal is to divest itself of any responsibility for its wanton deception of Mosher by foisting a spurious and concocted obligation upon Ward. Its assault upon Ward in its opening brief is Procrustean, stretching or dismembering the facts to fit its preconceived legal theory precisely as the giant Procrustes in Greek mythology stretched or dismembered the limbs of a luckless traveller to fit him to the giant's iron bed.

In its recital of what it calls "the facts", it has completely omitted to inform this Court that, with the single exception of the malodorous Orr,[5] *Union did not offer a*

[5] Orr's testimony was discussed in detail at pp. 48 et seq. of Ward's Opening Brief.

*single witness or a single document against Ward during the course of the trial below.* Typical of the exchange which occurred with every Union witness, excepting Orr, was the following after Union called its first witness, R. R. Branting (RT 510):

"Mr. Lotterman: Just a moment, I object to all this testimony as not binding upon Ward or in the presence of any representative of Ward. The conversation or any conversation between Mr. Branting and Mr. Lancaster of the Graver organization cannot possibly be binding upon Ward in this action.

Mr. McConnell: We are not offering it to bind you in any capacity, or to create any contractural relationships between you or anybody else. * * *

The Court: On the basis stated by Mr. McConnell, it will be received."

* * *

"Mr. Lotterman: I assume, your Honor, I will have a continuing objection without the need of voicing it, on this entire line of testimony, including these documents?

The Court: It's not being considered as to you. Mr. McConnell has said he's not offering it against you. * * * (RT 512)

Mr. Lotterman: I assume this document is not being offered against us.

Mr. McConnell: I am not offering it against you, counsel. * * * (RT 514)

* * *

Mr. Lotterman: I object to it, Your Honor, it purports to deal with a conversation not in our presence. Also purports to state what someone else at the other end of a telephone said to somebody else at the other end of a telephone, to which the

witness, although the person wrote the memorandum, could not possibly have heard or understood or know about it except from someone else. It is triple hearsay if I have ever seen anything that is triple hearsay.

Mr. McConnell: I am not offering it against you, counsel.

The Court: It may be received as to the plaintiff. Union's K in evidence. * * * (RT 516-517)

* * *

A. During the time that I was in Tucson I knew that Mosher had been employed by the Joint Venture as a subcontractor to fabricate steel. Their shipments were coming in.

Mr. Lotterman: Just a moment, I move to strike out that question—I mean that answer, I'm sorry—'I knew that Mosher had been employed.'

Mr. McConnell: If the Court please, we're not offering any of this witness' testimony against Mr. Lotterman or his client, or we are not trying to establish a plaintiff's case against Mr. Lotterman's client." (RT 538)

Similar exchanges occurred with Union witnesses, Middleton (RT 543, 555, 569-570), Deane (RT 603), Page (RT 696-697, 727-729) and Van Gorkom (RT 866).[6]

Having thus immunized the witnesses and documents which it offered upon the trial against Mosher from any cross-examination or counter testimony by Ward upon the explicit representations that none of its witnesses or documents were being offered against Ward, Union now proceeds with unbelievable irresponsibility to cite that very testimony and those very documents as evidence of "facts"

[6] Harle, Union's remaining witness, testified to nothing concerning Ward.

purportedly binding upon Ward which ostensibly justify the imposition of liability upon Ward. The alleged "facts" by which Union hopes to induce this Court to absolve it of its liability to Mosher need not detain us long:

1. At p. 1 of its brief, Union commences with the statement that Mosher's steel fabrication was "undertaken for the defendant Ward Industries Corporation and its joint venturer Idaho-Maryland Industries, Inc." That statement is totally false. The fabrication work was undertaken by Mosher, as Mosher itself admits, for Union.

2. Likewise at p. 1, it is stated that "the material fabrication was ordered by the Joint Venture. . . ." Again, the testimony of Mosher itself has conclusively established that the metal fabrication was ordered by Union.

3. Throughout the course of its brief, Union repeatedly asserts, in different forms, that "Union paid the Joint Venture for the steel fabrication work. . . ." (p. 1). Such a payment was allegedly made by Union's purported payment to the United California Bank of all of the IMI-Ward invoices which had been assigned to that Bank prior to the IMI bankruptcy (p. 17). Thus, it is asserted that "the bank presented these invoices (which allegedly included the invoices for Mosher's work) to Graver and received payment thereon" (p. 17). Union thereupon concludes that at the time of the IMI bankruptcy on February 2, 1962, the United California Bank had been paid in full upon all of the invoices which it then held as assignee.

All of these allegations are blatantly false. As Morton, IMI's President, testified, Union did *not* pay to the Joint Venture the monies due and owing to IMI or the Joint Venture at the time of the IMI bankruptcy (Morton, Dep. 1, 124). On the contrary, its failure to do so precipitated

that bankruptcy. Nor were the invoices held by the United California Bank paid by Union. On the contrary, on July 20, 1962, the Bank commenced an action against Union in the California Superior Court, Los Angeles County, upon invoices which Union had refused to pay amounting to the sum of $536,532.67. That action was subsequently removed to the United States District Court for the Southern District of California and was specifically noted in the opinion of this Court in one of the prior litigations between Union and Ward which reached this Court.[7]

In fact, in the settlement agreement between Union and Ward dated October 3, 1963, noted in this Court's opinion in 361 F. 2d 43 at 47, Ward was compelled by the explicit terms thereof to obtain a general release from the United California Bank to Union (R 385-386). It could only do so by paying to the Bank the sum of $536,532.67 for which the Bank had brought its action against Union.[8] Thus it is Ward and not Union which will be called upon to pay twice if the judgment against it is not reversed upon this appeal.

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[7] *Dragor Shipping Corporation* v. *Union Tank Car Company,* 361 F. 2d 43, 46, footnote 7. This Court, in addition, also dealt with two other phases of prior disputes between Union and Ward in 371 F. 2d 722 and 378 F. 2d 241.

[8] On June 29, 1967, after this Court had reversed the second decision of the Arizona District Court in 378 F. 2d 241, Union moved the Arizona District Court to vacate its prior order dismissing the original Arizona actions which had been compromised and settled by the October 3, 1961 settlement agreement, requesting that the parties be restored to the status quo which existed before that settlement agreement was executed and before those actions were dismissed thereunder with prejudice. In opposing that application which the Court denied, Ward emphasized that it would be impossible to restore the parties to the then status quo because, among other things, it had already paid the United California Bank the sum of $536,532.67 for a dismissal with prejudice of the Bank's action against Union and that sum could not possibly be restored to Ward. None of these facts was denied by Union before the Arizona District Court which, as aforesaid, denied Union's motion on August 2, 1967.

The falsity of Union's assertion in its opening brief that the United California Bank had been paid by Union is eloquently underscored by the completely contradictory argument which it makes at pp. 56 et seq. that "Mosher's invoices did not become payable until after IMI entered into bankruptcy on February 2. . . ." It is impossible to comprehend how Union can argue that Union had paid all of Mosher's invoices for its steel fabrication and, simultaneously, that Union was not required to pay such invoices because they "did not become payable until after IMI entered into bankruptcy on February 2."

4. To claim, as Union has claimed throughout the course of its brief, that Ward, and Ward alone, is liable to Mosher "as the party primarily responsible" (Union Br., p. 59) is fatuous self-deception. There is no question of the fact upon this record that Mosher was unmercifully tricked by Union, or to use Mr. Van Gorkom's more elegant phrase, "stalled along by the Graver personnel". (RT 875-876; Jt. Ex. 27) There is no doubt, also, of the fact that, had Mosher been more persistent and less trusting, it would have received the letter of Union's commitment, precisely as Page had promised.

Mosher was not the only company to be employed by Union for the fabrication of its steel. A good deal of the Vandenberg steel fabrication work which the Denver Steel and Iron Company was unable to perform within Union's time schedule was deleted from the IMI contract by Union in precisely the same way as the Tucson fabrication work was deleted. That work was awarded by Union to Allied Engineering Company under exactly the same circumstances as Union's grant of the Tucson work to Mosher. Allied was furnished by Union with a letter dated November 7 which constitutes almost a verbatim copy of the

letter dated October 16 received by Mosher. (Pl. Ex. 16) The only difference between the two is that, in the case of Tucson, Lancaster, Graver's Vice-President for Construction, had authorized Sam Wilson to execute that letter on behalf of Graver without committing Lancaster's signature thereto.

Allied was much more astute. It insisted that its letter be executed, not by Sam Wilson of Denver on behalf of Union, but by Lancaster as Vice-President of Graver. It also insisted upon a written agreement whereby Union, under the signature of Lancaster as Graver's Vice-President, undertook in writing to pay Allied directly, modifying its contract with IMI to delete the Vandenberg fabrication work therefrom and reduce the contract price accordingly. (Pl. Ex. 17)

In short, the Union-Allied transaction paralleled in every respect the Union-Mosher transaction, with the sole exception of the fact that Mosher allowed itself to be hoodwinked into accepting Union's oral promise,[9] whereas Allied insisted upon, and obtained, Union's written undertaking. Consequently, applicable thereto is the universal

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[9] On June 11, 1962, Ed Mosher and Moore of Mosher called upon Van Gorkom, then Union's Executive Vice-President and now its President, to request payment from Union (RT 865). As a result of their demand, Van Gorkom purportedly conducted an investigation into the circumstances surrounding Mosher's fabrication of Union's steel culminating in a written report to Browder, Union's general counsel (Jt. Ex. 27). Among the persons in the Union organization whom Van Gorkom interviewed was Page. For sheer callousness, the following testimony by Van Gorkom would be impossible to match (Van Gorkom, Dep. pp. 76-77):

> "I asked him (Page) whether Moore had ever followed up when he didn't get the letter, and he said no, he did not.
>
> Now, we know from other things I testified that he did call Trytten, but that was roughly a month later, and I said to Page, I said, 'You mean, in other words, that when the letter wasn't forthcoming, that Moore did not call up and harass you,' and he said, 'No, he did not.' And then I said, 'Well, I guess he then just left the thing go too long.'" * * *

principle of law that (Williston on Contracts, 3rd Ed., vol. 1, §67A, p. 216):

> "An offeree who has unjustifiably led the offeror to suppose that he had acquired a contractual right should not be allowed to assert an actual intent at variance with the meaning of his words or acts." * * *

5. At pp. 66 et seq. of its brief, Union reiterates a contention which it obsessively pursued in the court below, to wit, "that Mosher be ordered first to seek satisfaction from Ward before proceeding against Union" upon the ground that "Mosher has charged Union as a surety or party secondarily liable for an indebtedness the payment of which remains the primary responsibility of the defendant Ward" (p. 67). The authority for this extraordinary claim is purportedly found in the Arizona statute, ARS, §12-1642.

The foregoing argument, asserted at various times throughout the course of this action, is false in fact and void in law. None of the causes of action contained in the several counts of the plaintiff's amended complaint purports to impose upon Union a *secondary* or *derivative* responsibility predicated upon the acts of Ward or IMI vis-a-vis Mosher. On the contrary, every one of the Mosher causes of action against Union is founded *solely, entirely* and *exclusively* upon the *direct, original* and *primary acts* and *conduct* of Union itself, as a result of which Union incurred a primary and direct liability to Mosher.

In reviewing the allegations of the plaintiff's amended complaint, the Court below stated to Union's counsel during the course of the pre-trial hearing (RT 11-12) that *"Mosher is not claiming that you are an indemnitor . . .*, but as I read their pre-trial memorandum, they were treat-

ing you as a person *primarily liable,* a person who actually ordered this, and that again *as a person who is primarily liable,* it is promissory estoppel that you had told him that you were going to give him this writing, and they went ahead on the basis of that and furnished it, and then you didn't furnish it . . ."

In its Findings of Fact (##21-24 inclusive), the District Court found that Union contracted directly with Mosher on October 13, 1961, *many weeks before* there is the slightest suggestion that any obligation to Mosher for any purpose was incurred by IMI or IMI-Ward. In its Conclusions of Law (#3), the District Court ruled "Mosher *had a direct contractual relationship with Union . . .*" Not only did Union incur a direct, primary and individual obligation to Mosher on October 13, 1961; it repeatedly reaffirmed its direct and primary obligation to Mosher on many occasions thereafter, all of which have been found by the Court in its findings of fact.

Although we vehemently disagree with the District Court's imposition of liability upon Ward, it must be noted that its ruling was predicated solely upon the issuance of Jt. Exs. 9 and 10 which were not received by Mosher until November 10, 1961 (FF #30), *almost a month after Union had already obligated itself to Mosher for the fabrication in question.* Consequently, the Court found, as Mosher itself alleged, in paragraph 3 of Count 2 of its amended complaint that, by the issuance of Jt. Exs. 9 and 10, "Ward Industries Corporation, defendant, became *an additional obligor* to plaintiff for said sum." Obviously, therefore, if anyone should be primarily responsible for the payment of the within judgment, and should be directed to apply its assets first to the discharge thereof, it should be Union and not Ward. Ward's alleged liability as "an additional

obligor" would never have arisen if Union had properly and promptly discharged its original and primary obligation to pay Mosher.

Under these circumstances, it is perfectly obvious that Article 9, Title 12, Arizona Revised Statutes, §12-1642 has no possible application to the case at bar. It will be noted that subdivision A refers to an action "brought *against two or more defendants upon a contract,* and one or more defendants are surety for the others * * *".

The specific phraseology of the quoted section, as well as other sections of Article 9, compels the following conclusions: Firstly, the action must be brought against *two defendants* upon the *same contract* and *not* upon the separate, individual, primary, independent and unrelated promises of each. Secondly, one of the defendants must be "bound as surety" for the other upon that same contract. He cannot be deemed a surety if he is held liable *upon his own separate, individual, independent and unrelated promise.* Thirdly, the issue of suretyship, if such an issue exists, must be "tried and determined . . . before the trial". No such issue was ever tried and determined before the trial herein. Fourthly, if such an issue is determined in favor of the surety in an action brought against it, the Court's power is limited to an order directed to the sheriff to levy execution upon the property of the principal which is subject to execution *"and situate in the county in which the judgment is rendered."* It could not possibly authorize the mandate sought by Union herein. Finally, these provisions of the Arizona statute relating to the provisions of a judgment to be entered in a state court, find no counterpart in the Federal Rules of Civil Procedure, the provisions of which must prevail (*Kunzel* v. *Universal Carloading and Distributing Co.,* 29 Fed. Supp. 407, 410).

## CONCLUSION

We would prolong this brief to unmanageable lengths if we were to recite every contradiction, every misstatement and every improvisation adopted by Mosher and Union upon this appeal in their respective efforts to sustain a judgment against Ward for which there is no factual, legal, moral or ethical justification. Sufficient has been adduced in our opening brief and in this reply brief to underscore the invalidity of the judgment against Ward and the necessity of reversing the same and dismissing Mosher's claims against Ward in this action upon the merits.

Respectfully submitted,

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**Certificate of Compliance**

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief is in full compliance with those rules.

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